APPENDIX

Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 10985

THEATRES SERVICE COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants*

DANCE FREIGHT LINES, INC., *Intervenor*

Before TUTTLE, Circuit Judge, SMITH, District Judge, and HOOPER, Senior District Judge.

PER CURIAM.

STATEMENT OF THE CASE

The plaintiff, Theatres Service Company, is moving to strike and avoid an order of the Interstate Commerce Commission.

This order followed the recommendation of the Trial Examiner and granted a petition filed by Dance Freight Lines, Inc. seeking an order requiring Theatres Service Company to cease and desist transporting goods over routes as to which Dance held a certificate.

Another order, seeking to amend the certificate held by this plaintiff, is not complained of.

I. Concerning Unauthorized Transportation By Theatres Service Company

The Examiner found that in No. MC-C-4892 the transportation by Theatres Service Company of books for Kingsport Press, Inc. of Kingsport, Tennessee to the consignees was not authorized by the certificate of Theatres Service No. MC-65697, Sub-number 2, which authorizes the transportation of books "consigned to or from magazine dealers and distributors," and recommended that Theatres Service should be ordered to cease and desist from such transportation.

The Commission followed the recommendation of the Examiner, and this Court must affirm said order if it placed the proper interpretation upon the certificate in question.

1—The certificate authorized transportation by Theatres Service as follows:

> "*Newspapers* and newsprint stock consigned to, or consigned from, theatres or newspaper publishers, and *magazines, books, and periodicals, consigned to, or from, magazine dealers* and distributors, between Atlanta, Georgia and points in Alabama, Tennessee and Georgia", (Italics supplied)

over routes thereinafter specified.

The first contention made by the plaintiff is that the language contained in the above, to-wit: ". . . consigned to, or from, magazine dealers and distributors," had reference only to "periodicals" and did not have reference to "books". A mere casual reading of the quoted portions above shows beyond any doubt that the quoted phrase covered "magazines, books and periodicals."

2—The next contention by Theatres Service turns upon the meaning of the phrase "magazine dealers and distributors" principally, as it may be sought to be applied to the consignees of these shipments. The finding by the

Commission that Kingsport Press, consignor, is neither a dealer nor a distributor is covered below.[1]

In the brief of Dance and other protestants the word "distributor" is equivalent to a "wholesaler" and is defined as "one who buys goods from importers or producers and sells to retailers, thus a middleman", citing Encyclopedia Dictionary of Business as authority for that definition.

These parties also point out that the terms above referred to are ambiguous and that it is necessary for a lawful interpretation to consider the circumstances surrounding its grant. As a matter of fact, what the Commission was really called upon to do in this case was to interpret and define, and to apply, the language in what had previously been assigned to Theatres Service.

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[1] Such report contains the following:

"Kingsport Press, as well as numerous other printers, are served by defendant as magazine distributors on the theory that they are engaged in distributing the magazines on behalf of their customers, the publishers, who specify the consignees and the quantities for each. This obviously involves an application of the literal definition of 'distributor' as one who distributes or disperses articles, among others. In the opinion of the examiner this is a wholly unrealistic construction of the term, and one which goes far beyond the ordinary commercial usage of the term to describe one who generally acts as a middleman in the marketing of goods by purchasing them from various dealers who in turn deal with the ultimate consumer. Although the evidence relating to Kingsport Press is meager, it clearly establishes that in spite of the fact that it is engaged in printing magazines, that company is not a magazine distributor within the meaning of defendant's Sub 2 authority under consideration here. Nor is it a magazine dealer, i.e., one who deals in magazines at the retail level."

The report further stated:

"The witness for defendant attempted a definition of 'magazine distributor' as one who distributes magazines by selling, mailing or shipping."

II.

The Examiner stated:

> "Whether the shipments involved in the complaint proceeding were within defendants authority depends upon whether the consignees involved were magazine dealers or distributors."

Eleven shipments were involved and ruled upon as follows:

It was conceded that three shipments of text books made to Georgia School Book Deposit in Atlanta for distribution to public schools of Georgia, and four shipments of text books to Allen & Bacon, Inc. in Atlanta were not shipments to either dealers or distributors.

Two shipments of hymnals to Baptist Book Store in Atlanta and one shipment of the same to Baptist Book Store in Birmingham were fully discussed by the Examiner who reported as follows:

> "The Baptist Book Stores are operated by the Baptist Sunday School Board which also operates separate departments or divisions for publishing, printing, selling, and distributing books and magazines. In spite of the fact that some of the publications sold by the Book Stores might be characterized as magazines, and the fact that the witness who operates the Atlanta store considers it to be a distributor and dealer of magazines, these stores are not properly classified as such. They are obviously not magazine distributors and, in the opinion of the examiner, are not magazine dealers. The magazines published and printed by divisions of the Sunday School Board are not distributed through the Book Stores for sale to the public. Only one or two publications described as being sold by the Atlanta store may possibly be classified as magazines. In the commercial sense, by which we must be guided here, the Book Stores are in no wise magazine dealers."

Subsequent to oral argument counsel for intervenor has submitted to this Court copy of transcript of the hearing before the examiner which opposing parties by letter to this Court have consented to be added in evidence, and the Clerk is directed to so enter the same as intervenor's Exhibit #1. No error was committed by the Commission in admitting the testimony by Ira C. Pound, Jr., James H. Brown and Robert Mendenhall therein complained of.

As to the single shipment of books to St. Joseph High School in Atlanta, the report stated:

> "The latter school is served as a 'possible' magazine distributor on the theory that 'so many of the school systems' do distribute magazines. Here again, defendant is applying a literal construction of the term 'distributor' and is, in the opinion of the examiner, in error in so doing."

We are clear in our opinion that the Commission was amply justified in its ruling that Kingsport Press, Inc. is not a distributor. We also believe and find the Commission was justified in finding that the organization operating under the auspices of St. Joseph High School in Atlanta was not a magazine dealer.

As To Baptist Book Store

The findings of the examiner included the following:

> "The Baptist Book Stores * * * are obviously not magazine distributors and, in the opinion of the examiner, * * * (i)n *the commercial sense, by which we must be guided here,* the Book Stores are in no wise dealers. (Emphasis supplied). [Hearing Examiner, 6, 71]"

In the comprehensive and enlightening brief filed by counsel for the Commission it is made clear that in transportation parlance through common usage certain terms

and phrases take on a much more restrictive meaning, separate and distinct from an academic definition of the words utilized. See *Eclipse Motor Lines, Inc.—Interpretation of Certificate*, 52 M.C.C. 391, 392; *Guyott Construction Co., Inc.—Extension Fuel Oil*, 49 M.C.C. 265, 270 and *Interstate Commerce Commission* v. *Black*, 6 Federal Carriers Cases, § 80,466, pp. 2365-2368. Many other cases could be cited to the same effect.

The testimony before the examiner of Robert Mendenhall, manager of Baptist Book Store, is revealing. The following interrogation is contained in the record:

> Q: Mr. Mendenhall, in all candor, the Atlanta Baptist Book Store is not considered by you to be primarily a distributor or dealer of magazines as such, is it?
>
> A: I would have to answer no.
>
> Q: Are you primarily—While you are primarily not a dealer in magazines or a distributor of magazines, as you have stated just a moment ago, do you consider yourself to be a dealer of magazines?
>
> Mr. Born: Now, I object to that question, Mr. Examiner. The question has already been asked and answered.
>
> Mr. Sutherlund: I think it was "primarily" your question or "as such", I'm asking him if he considers himself at all in any regard a dealer in or of magazines.
>
> The Witness: I would have to say yes.

The Commission in ruling that Baptist Book Store was not a "magazine dealer" did not lay down any rule or standard by which the matter could be determined in the future, that is to say, it did not state whether a business concern in order to be classed a magazine dealer must sell

any magazines, or a substantial amount of magazines, or should be primarily a dealer in magazines, or should be commonly known to the public as a magazine dealer. We therefore have presented to us only the narrow question as to whether the Commission erred under the facts in this record of finding that the Baptist Book Store was not a magazine dealer, and we rule without hesitancy that it did not so err.

Judgment of the Court

For reasons as set forth in the Opinion of this Court herewith filed,

IT IS ORDERED AND ADJUDGED that the prayers of the plaintiff be, and they are hereby, denied, and a judgment be, and it is hereby rendered in favor of the defendants, with costs against the plaintiff.

This the 27th day of November, 1967.

/s/ ELBERT P. TUTTLE
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.
United States District Judge

/s/ FRANK A. HOOPER
United States Senior District Judge

I.C.C. Decision and Order

Service Date
March 31, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 20th day of March, A. D. 1967.

No. MC-C-4892

DANCE FREIGHT LINES, INC.

v.

THEATRES SERVICE COMPANY

No. MC-65697 (Sub-No. 34)

THEATRES SERVICE COMPANY EXTENSION—MAGAZINES, BOOKS, AND PERIODICALS

Upon consideration of the complaint in No. MC-C-4892, the application in No. MC-65697 (Sub-No. 34), and the record in the above-entitled proceedings, including the report and recommended orders of the examiner, the exceptions thereto filed by respondent-applicant, Theatres Service Company, and the reply to the exceptions filed by complainant-protestant, Dance Freight Lines, Inc.; and

It appearing, That the exceptions and reply raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Division 1 discussing the evidence in the light of the pleadings;

It further appearing, That in No. MC-65697 (Sub-No. 34) the examiner recommended that the application for a certificate of public convenience and necessity be denied;

And it further appearing, That in No. MC-C-4892 the examiner recommended that respondent, Theatres Service Company, be ordered to cease and desist from certain operations;

Wherefore, and good cause appearing therefor:

We find, That the evidence, considered in the light of the exceptions and reply thereto, does not warrant a result different from that reached by the examiner; and that the statement of facts, the conclusions, and the findings of the examiner, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the application in No. MC-65697 (Sub-No. 34) for a certificate of public convenience and necessity be, and it is hereby, denied; and that this order, insofar as it pertains to the said application, shall be effective on May 29, 1967.

It is further ordered, That in No. MC-C-4892, respondent Theatres Service Company be, and it is hereby, ordered and required to cease and desist forthwith, and thereafter to refrain and abstain from all operations, in interstate or foreign commerce, of the character found in the examiner's report to be unlawful.

And it is further ordered, That in No. MC-C-4892, the statutory compliance date after which respondent will be held to be in willful violation of this order shall be May 29, 1967.

By the Commission, division 1, Commissioners Murphy, Webb, and Tierney, (Commissioner Webb, not participating).

H. NEIL GARSON,
Secretary.

(SEAL)

Examiner's Report

INTERSTATE COMMERCE COMMISSION

Served August 29, 1966

No. MC-C-4892[1]

DANCE FREIGHT LINES, INC.

v.

THEATRES SERVICE COMPANY

David A. Sutherlund for defendant and applicant.

Paul M. Daniel and *Robert E. Born* for complainant and protestant.

J. C. Hutcheson, Clifford E. Sanders, Blaine Buchannan and *Bill R. Davis* for protestants.

REPORT AND ORDER
RECOMMENDED BY JAMES A. MCKIEL, HEARING EXAMINER

In No. MC-C-4892, by complaint filed September 2, 1965, Dance Freight Lines, Inc., of Cincinnati, Ohio alleges that Theatres Service Company, hereinafter called defendant or applicant, a motor common carrier of Atlanta, Ga., is and has been transporting books originating at Kingsport, Tenn., which are not authorized by its certificates inasmuch as neither the consignees nor the consignors are magazine dealers or magazine distributors. It asks that a cease and desist order be issued. Defendant, in its answer, concedes that it has transported "books" for Kingsport Press, Inc., from Kingsport to Atlanta, but asserts that such transportation is completely lawful under the terms of its certificate inasmuch as the consignor, and in certain instances the consignee, is a "magazine dealer or distributor".

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[1] This report also embraces No. MC-65697 (Sub-No. 34), Theatres Service Company Extension—Magazines, Books, and Periodicals.

In No. MC-65697 (Sub-No. 34), by application filed August 27, 1965, applicant seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of magazines, books, and periodicals between the points and over the routes described in Appendix A hereto.

The complaint and the application were referred to the examiner for hearing and the recommendation of appropriate orders thereon. Hearing was held on a consolidated record on April 18, 19 and 20, 1966, at Atlanta. The application is opposed by Tennessee Carolina Transportation, Inc., Dance Freight Lines, Inc., Mason and Dixon Lines, Incorporated, Mason and Dixon Lines, Inc., Central Motor Express, Inc., and Jack Robinson, doing business as Robinson Freight Lines.

Briefs

Briefs were filed by applicant-defendant and jointly by complainant and protestants. Matters raised on brief but not discussed herein or reflected in the findings have been considered and found not justified.

On brief, applicant-defendant alleges that the evidence clearly establishes that almost all of the books which it has transported in 1965 were within the scope of its present authority but that a grant of the considered application would "alleviate the necessity to conduct elaborate investigations and would ensure that the few questionable shipments which have been transported are within the terms of its authority." Applicant urges that the modification sought by the application should be considered in the light of criteria similar to those applied to alternate route, gateway elimination, and keypoint modification cases, namely, that operating economies and efficiencies will be effected and a new competitive service will not be instituted which would adversely affect the operations of presently authorized carriers. So considered, it urges that there is ample

justification for the proposed modification. Applicant regards the restriction in its Sub 2 certificate to be unique as "the Commission usually grants authority to transport specific commodities to the public generally or commodities generally from or to a specific class." The so-called double restriction encountered here requires applicant to conduct an investigation to first determine whether the commodity is a magazine and then whether the consignor or consignee is a magazine dealer or distributor. As defendant, it maintains that the complaint should be dismissed inasmuch as no evidence was presented by complainant to show that Kingsport Press is not a magazine dealer or distributor.

Complainant and protestants allege, on brief, that (1) the terms of applicant's certificate are ambiguous and indefinite and it is necessary for a lawful interpretation and construction thereof to consider the circumstances surrounding its grant in order to determine the true importance and meaning based upon industry or trade usage and practices and common understanding, and (2) the background and circumstances surrounding the grant of authority under consideration require that the term "distributor" be construed to mean one whose regular business is that of a wholesaler (of magazines) as that term is understood in business and trade usages and that the term "dealer" be construed to mean one who otherwise deals in (sells) magazines as a regular business. They further allege, however, that the same construction is compelled by the terms of the certificate itself. Based upon such construction, they request the following findings be made: (1) in the complaint proceeding, that the shipments involved were transported without authority and a cease and desist order be entered requiring defendant to cease and desist and thereafter refrain from transporting books or other publications from Kingsport Press to any consignee who is not a magazine dealer or distributor, and (2) in the application proceeding, that no showing of public need for the authority sought has been shown, and that applicant's fitness is in doubt in view of its unlawful transportation activities.

The Complaint Proceeding

Defendant holds authority in No. MC-65697 (Sub-No. 2) to transport, among other things, magazines, books, and periodicals consigned to or from magazine dealers and distributors between the points in Alabama, Georgia, and Tennessee, as described in Appendix B hereto. The routes are substantially the same as those sought by the Sub-No. 34 application as described in Appendix A. Pursuant to such authority, applicant has been transporting books for Kingsport Press, Inc., from Kingsport, Tenn., to Atlanta and Birmingham, which transportation is the subject matter of the complaint, it being alleged that neither the consignor nor the consignee in the specific instances cited are magazine dealers or magazine distributors. In addition, it holds authority to transport motion and sound picture films, equipment, and supplies used in the maintenance of theatres, and newspapers, books, and periodicals, over specified routes in the same States sought here, some of the routes duplicating portions of those involved here.

Although no representative of Kingsport Press, Inc., testified at the hearing,[2] testimony by Mr. Sanders (counsel for Mason and Dixon in the application proceeding herein), whose law firm has represented that company in various matters from time to time, revealed that it prints books under contract with various publishers and ships them according to the latter's instructions. Although the evidence is very meager on the subject, resort to the company's 1964 annual report to stockholders indicates that it has in the past done little magazine printing but that new equipment installed during 1964 is capable of produc-

[2] Witness for complainant requested an officer of that company to testify but he declined to do so because "He doesn't want his competitors to know what he is bidding on or what he has done in the past and he could not reveal the information without revealing what they were doing and what they were attempting to do." (Tr. pg. 252).

ing magazines as well as other printed products. Other evidence indicates that it expects to do more magazine printing in the future. It was stipulated that Kingsport Press "may sometimes in the past and may from time to time in the future print magazines."

Sometime in 1965 representatives of defendant and Kingsport Press, Inc., discussed that portion of defendant's authority under consideration here and concluded that the latter could transport books for that shipper inasmuch as it prints several "magazines", namely, two so-called regular magazines and two special magazines. The former are "Metals Engineering Quarterly," an engineering trade publication, and "Philosophy East and West", a University of Hawaii publication. Defendant's witness considers Kingsport Press a magazine distributor by virtue of the fact that it mails the publications in accordance with its contractor's instructions. The special magazines are "The Great Race" and "The Men in Their Flying Machines", which appear to be programs of the motion pictures having the same titles and which are commonly sold to patrons as they enter the theater. Pursuant to the determination that Kingsport Press is a magazine distributor, defendant transported the following shipments which are the subject to the complaint: 3 shipments of textbooks to Georgia School Book Depository at Atlanta, 4 shipments of textbooks to Allyn & Bacon, Inc., at Atlanta, 2 shipments of hymnals to the Baptist Book Store at Atlanta, 1 shipment of hymnals to the Baptist Book Store at Birmingham, and 1 shipment of educational books to Sister Mary Severine, St. Joseph High School at Atlanta. The Georgia School Book Depository, an agency of the State Board of Education, stores textbooks for distribution to the public schools of Georgia. Allyn & Bacon, Inc., is a textbook publisher with headquarters in Boston, Mass., and an office in Atlanta. The Baptist Book Stores in Atlanta and Birmingham are two of several retail book stores operated by the Baptist Church which sell religious material including

books and magazines. St. Joseph High School is a parochial school which operates on its premises the Notre Dame Book Store which sells religious material of a nature and in a manner similar to the Baptist Book Store heretofore noted.

In construing defendant's authority, the important terms, of course, are "dealers" and "distributors." Dictionary definitions are not helpful, as conceded by all parties. The witness for defendant attempted a definition of "magazine distributor" as one who distributes magazines by selling, mailing, or shipping. In the brief of complainant and protestants the following definition is cited and is considered pertinent (Encyclopedic Dictionary of Business, Prentice-Hall, Inc., New York, 1952, pages 232 and 698):

> *Distributor.* See Wholesaler.
>
> *Wholesaler.* One who buys goods from importers or producers and sells to retailers; thus, a middleman. The U. S. Bureau of Census defines two categories of middlemen—"wholesale merchants" and "functional middlemen." The following are classed as "wholesale merchants": converters, exporters, importers, cash-and-carry wholesalers, drop shippers, mail order wholesalers, wagon distributors, supply and machinery distributors. "Functional middlemen"—those who do not take title to the goods they sell—include brokers, commission merchants, export agents, import agents, manufacturers' agents, purchasing agents, sales agents.
>
> Individual trade practices determine whether the wholesaler is called a "jobber" or a "distributor". In the apparel industry wholesalers who buy finished goods from producers and sell to retailers are called jobbers. They are not limited to sales territories. But, wholesalers who have goods made to their specifications by others, and then sell to retailers, are called manufacturers.

> In most fields, the distributor functions like a company branch; he buys from producers and sells to retailers in a limited territory.

Kingsport Press, as well as numerous other printers, are served by defendant as magazine distributors on the theory that they are engaged in distributing the magazines on behalf of their customers, the publishers, who specify the consignees and the quantities for each. This obviously involves an application of the literal definition of "distributor" as one who distributes or disperses articles among others. In the opinion of the examiner this is a wholly unrealistic construction of the term, and one which goes far beyond the ordinary commercial usage of the term to describe one who generally acts as a middleman in the marketing of goods by purchasing them from manufacturers or producers and selling them generally to various dealers who in turn deal with the ultimate consumer. Although the evidence relating to Kingsport Press is meager, it clearly establishes that in spite of the fact that it is engaged in printing magazines, that company is not a magazine distributor within the meaning of defendant's Sub 2 authority under consideration here. Nor is it a magazine dealer, i.e., one who deals in magazines at the retail level. Whether the shipments involved in the complaint proceeding were within defendant's authority depends on whether the particular consignees involved were magazine dealers or distributors. Defendant concedes that two of the consignees (Georgia School Book Depository and Allyn & Bacon, Inc.) are not magazine dealers or distributors, hence 7 of the 11 shipments involved were handled without appropriate authority. The other consignees were the Baptist Book Stores at Atlanta and at Birmingham and the St. Joseph High School. The latter school is served as a "possible" magazine distributor on the theory that "so many of the school systems" do distribute magazines. Here again, defendant is applying a literal construction of

the term "distributor" and is, in the opinion of the examiner, in error in so doing. The Baptist Book Stores are operated by the Baptist Sunday School Board which also operates separate departments or divisions for publishing, printing, selling, and distributing books and magazines. In spite of the fact that some of the publications sold by the Book Stores might be characterized as magazines, and the fact that the witness who operates the Atlanta store considers it to be a distributor and dealer of magazines, those stores are not properly classified as such. They are obviously not magazine distributors and, in the opinion of the examiner, are not magazine dealers. The magazines published and printed by divisions of the Sunday School Board are not distributed through the Book Stores for sale to the public. Only one or two publications described as being sold by the Atlanta store may possibly be classified as magazines. In the commercial sense, by which we must be guided here, the Book Stores are in no wise magazine dealers. It is clear, therefore, that all of the shipments which are the subject of the complaint were transported by defendant without appropriate authority therefor.

The Application Proceeding

Although applicant believes that its Sub-No. 2 certificate as heretofore described embraces the transportation made the subject of the complaint proceeding, it seeks by the instant application to modify that certificate by eliminating the requirement that the magazines, books, and periodicals be consigned to or from magazine dealers or distributors. Its case is based primarily on the proposition that the terms "dealer" and "distributor" are ambiguous and their inclusion as limitations on the authority granted in the Sub-No. 2 certificate places an undue burden of interpretation on its personnel in many instances and thus invites unintentional violations. It made no attempt to establish public convenience and necessity in the traditional sense, its support being from present and past users of its service

and designed to establish ambiguity in the foregoing terms as well as the fact that they come within one or the other of such classifications and hence can now be served by applicant. The considered authority now contained in the Sub-No. 2 certificate was originally issued in "grandfather" proceedings for the transportation of "newspapers and newsprint stock consigned to or consigned from newspapers or theatres, and magazines, periodicals, and monthly publications consigned to or from magazine dealers and distributors". It was subsequently modified to "newspapers and newsprint stock consigned to or consigned from theatres or newspaper publishers, and magazines, books, and periodicals consigned to or from magazine dealers and distributors".

Applicant operates 185 pieces of equipment, including 44 tractors and 61 semi-trailers, and maintains terminals at Albany and Atlanta, Ga., Birmingham, Gadsden, and Huntsville, Ala., and Chattanooga and Knoxville, Tenn. Its balance sheet as of December 31, 1965, shows current assets of $296,029 and current liabilities of $210,760. In 1965 it had a net income of $193,822.

Applicant submitted an exhibit listing all of the some 3,500 shipments of books it transported in 1965 from 46 consignors to over 500 consignees, including the shipments from Kingsport Press heretofore discussed. Although applicant maintains that the vast majority of those shipments were lawful, its witness conceded that some of them are clearly unauthorized and that no investigation had been made as to the status of others. Protestants concede that the "large majority" of the shipments shown on this exhibit were within the scope of applicant's certificate, e.g., those from consignors Southern Publishing Association, Abingdon Press, Broadman Press, and Parthenon Press, as well as those to many consignees. No attempt is made here to further analyze the shipments shown on this exhibit as the evidence is insufficient to enable a determination of

whether the individual consignors and consignees are in fact magazine distributors or dealers. Representatives of a few of them testified in support of the application as hereinafter noted. An analysis of those shipments by applicant's representative is as follows: Of the 46 consignors, 33 are magazine dealers or distributors and 7 are not such; of the latter 7, 5 of the consignees are magazine dealers or distributors and 2 are unknown. Of the remaining 6 consignors, which were not investigated, the consignees for 3 of them were magazine dealers or distributors and the status of the other 3 consignees was not determined.

Seven shipper representatives testified in support of the application, viz., Georgia Cumberland Book and Bible House, Methodist Publishing House, Meredith Press, Ginn and Company, Foote and Davies, Birmingham Board of Education, and Baptist Sunday School Board.

Georgia Cumberland Book and Bible House is owned and operated by the Seventh-Day Adventist Church and protestants concede that its activities along with those of the other divisions of that Church (Southern Publishing Association and Home, Health and Education Service) are within applicant's existing authority. Such being the case, applicant's purpose in presenting this witness was to stress the problems involved in interpreting this authority particularly in distinguishing books from magazines and determining whether a given consignor or consignee is a magazine distributor or dealer. Applicant's services have been satisfactorily used for 7 or 8 years, during which time it has never refused to handle a shipment for lack of authority.

Methodist Publishing House and its divisions, Parthenon Press (manufacturing), Abingdon Press (wholesale outlet), Cokesbury Press (retail outlet), and Graded Press (publisher of church school material), print, publish, sell, and distribute magazines and books and protestants concede that they may be served under applicant's present

authority. Applicant's services have been satisfactorily used since 1954. In 1965 the several divisions used applicant for the transportation of 129 shipments of books primarily between Nashville and Atlanta.

Meredith Publishing Company publishes books, magazines, and periodicals. The *Better Homes & Gardens* publications which it ships by applicant are shipped from Des Moines, Iowa, to distributors at Atlanta in pool cars. Applicant's service, which has been used since 1953, has been good. In 1965 it moved approximately 78 shipments of books by applicant from Atlanta to various points on the considered routes. Its practice, which is the normal practice in the magazine and book publishing business, is for the publisher to sell to a wholesaler or distributor who takes title or receipt and thereafter markets the publications through a retailer to the ultimate consumer. Here again, protestants concede that shipments from this company are within applicant's authority inasmuch as they are always to a magazine distributor.

Ginn & Company of Atlanta publishes books and related materials primarily for schools. It ships to consignees in Georgia and to its depositories at Nashville and Birmingham, among other points. In Birmingham it ships to a public warehouse which handles books of various educational publishers for whom it acts as agent in distributing them to Alabama school book depositories. It has used applicant for transporting books both intrastate and interstate since 1958 and has had a constant problem of determining whether applicant can handle certain shipments inasmuch as Ginn handles no magazines.

Foote and Davies, a division of McCall Corporation, is a commercial or contract printer of magazines, books and periodicals which are shipped to news agencies, warehouses, schools, and churches. It specializes in high school and college yearbooks and about 90 percent of its books are

shipped to schools. About 90 percent of the publishers leave the routing of their shipments to Foote and Davies. The consignees are, of course, specified by the publisher. Applicant's service has been used since 1957 and always found to be good, whereas other carriers were tried and found to be not so good.

Birmingham City Board of Education orders magazines for 13 of the 100 schools under its jurisdiction on an annual bid basis. During the school season the magazines are mailed direct to the schools but during the summer when some of the schools are closed they are sent to the offices of the Board which delivers them to the schools when they are opened. Books are ordered from local depositories as well as from out-of-State sources. In the future it is anitcipated that more books will be ordered from sources located at Atlanta. Applicant's service on the movement of books from Atlanta has been completely satisfactory; however, the Board has no control over the delivery and is not concerned with the carrier selected.

The Baptist Sunday School Board of Nashville, Tenn., through its several divisions (Broadman's Press, Convention Press, and Broadman's Sales) publishes, prints, sells, and distributes magazines and books. Its publications are distributed to retail and wholesale outlets and to churches, and protestants concede that shipments to and from the Board are within applicant present authority. The Baptist Book Stores which are operated by the Board have heretofore been discussed in the complaint proceeding. In 1965 the Board tendered applicant 168 shipments of books and the Book Stores received 95 shipments of books by applicant. The Atlanta Book Store always requests the services of applicant as it is the only carrier providing overnight delivery from Nashville to Atlanta. The witness considers the Book Stores to be magazine dealers though not primarily such.

Protestants

Tennessee Carolina Transportation, Inc., holds authority to transport general commodities, with exceptions, (a) over irregular routes, between Charlotte, N. C., on the one hand, and, on the other, points in South Carolina within 150 miles of Charlotte, except points in Anderson, Cherokee, Greenville, Oconee, Pickens, and Spartanburg Counties, S. C. that part of York County, S. C., west of South Carolina Highways 49, 5 and 91, that part of Chester County, S. C., west of South Carolina Highways 91 and 9, that part of Union County, S. C., north of South Carolina Highway 9, and those in North Carolina other than those in Mecklenburg County and those south of U. S. Highway 29 between the South Carolina-North Carolina State line and Charlotte, N. C., and west of North Carolina Highway 49 between Charlotte and the North Carolina-South Carolina State line and those on the indicated portions of the highways specified, and (b) over irregular routes extending from Charlotte, on the east, to Nashville, on the west, via Hickory and Ashville, N. C., and Knoxville, Cookeville, Chattanooga and McMinnville, Tenn. It operates 475 pieces of equipment and has terminals at Ashville, Charlotte, Greensboro, Hickory and Raleigh, N. C., and Chattanooga, Cookeville, Knoxville, McMinnville and Nashville, Tenn. During the first three months of 1966, it transported 52 shipments of books or magazines weighing a total of 197,056 pounds. Four shipments originated at Kingsport and were received from interline carriers at Knoxville, and the balance were received at Nashville. Destinations were all in North Carolina and Virginia. Until about 1960, it participated in such traffic to Alabama and Georgia points but it was lost to competition. A number of its shipments also included such miscellaneous items as scissors, clay moldings, envelopes and notions. The witness believes that all of the book traffic in the foregoing shipments would be subject to diversion if this application is granted. It is considered desirable traffic which is

continually solicited and it has been handled for a number of years. The exhibit listing the above shipments is predicated on the assumption that neither the consignee nor the consignor is a dealer or distributor of magazines.

Dance Freight Lines, Inc., holds authority to transport general commodities over regular routes between Cincinnati, Ohio and Columbus, Ga., through such points as Kingsport, Morristown, Knoxville and Chattanooga, Tenn., and Athens, Atlanta and Macon, Ga. It has interline arrangements at Atlanta and Columbus on traffic to Alabama and arrangements with other carriers, including Mason and Dixon and Tennessee Carolina, at Chattanooga and Knoxville. It maintains terminals at Atlanta, Athens, Columbus and Macon, Ga., and Chattanooga, Kingsport, Knoxville and Morristown, Tenn., and operates 159 tractors, 37 open-top trailers, and 298 vans, as well as 89 pickup trucks. Between February 1, 1964 and March 17, 1965, it transported the following shipments of books from Kingsport Press, Inc., at Kingsport to receivers in Atlanta: a total of 47 shipments weighing 784,953 pounds and producing a revenue of $3,886. During the period March 18, 1965, through March 31, 1966, it transported from and to the same points 7 shipments weighing 116,396 pounds and producing a revenue of $989. The stated purpose of submitting the above data with a cut-off date of March 17 (which was the date applicant began handling traffic for Kingsport Press) was to show the loss of traffic it experienced as a result of applicant's operations; admittedly, however, some of this traffic was lost to Mason and Dixon. Protestant has received no complaints from Kingsport Press regarding its service to Atlanta. It has also served another shipper at Kingsport, Tenn. Its traffic between Kingsport and Atlanta is heavier northbound; hence, it needs additional southbound traffic to effect a better balance. Between those points it holds out an overnight service. It holds out the same service on its scheduled operation between Atlanta and Chattanooga.

Mason and Dixon Lines, Incorporated holds general commodity regular route authority, as pertinent, between Nashville, Knoxville, Memphis, Birmingham, Chattanooga, and Atlanta, among other points. It maintains terminals at Kingsport, Chattanooga, Cookeville, Greenville, Knoxville, Morristown, Nashville, and Rogersville, Tenn., Atlanta, Dalton and Rome, Ga., and Birmingham, Decatur, and Huntsville, Ala. It operates 750 tractors, 1,200 trailers and 250 pickup trucks. It handles an estimated one million pounds a month for Kingsport Press and also handles books for other shippers at Kingsport. Books are considered desirable traffic, carrying a good rate and often loaded on skids for easy pickup and delivery. It has interline arrangements at various terminal points for serving points not authorized.

The examiner is of the opinion that applicant has failed to establish that the proposed service will meet any useful public purpose or be responsive to a public need. A considerable portion of the book traffic has been handled by applicant within the scope of its authority as being "consigned to or from magazine dealers or distributors"; however, a significant amount of traffic has been handled without appropriate authority under an erroneous interpretation of the considered restriction. Applicant's problem has been more with classifying publications as magazines inasmuch as its literal or dictionary interpretation of "distributors" would allow it to serve anyone who dispenses or passes out magazines to others. As heretofore indicated, a proper construction of that term according to commercial or trade usage is that it means one (commonly called a wholesaler) whose regular business function is that of a middleman in the marketing of goods in that he purchases such goods from manufacturers or producers and sells them to dealers who in turn sell to the consumer. It does not appear that a proper interpretation of the certificate as indicated herein places an undue burden on applicant so as to require removal of the restriction considered here. The application should be denied.

FINDINGS

In No. MC-C-4892, the examiner finds that defendant's transportation of books for Kingsport Press, Inc., of Kingsport, Tenn., to the consignees as described in this report was not authorized by its certificate No. MC-65697 (Sub-No. 2) insofar as it authorizes the transportation of books "consigned to or from magazine dealers and distributors"; and that an appropriate order should be entered in No. MC-C-4892 requiring defendant to cease and desist from such transportation.

In No. MC-65697 (Sub-No. 34), the examiner finds that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation.

In view of the findings herein, it is recommended that the appended orders be entered.

By *James A. McKiel*, Hearing Examiner.

(Signature) James A. McKiel

Examiner's Report

APPENDIX A

Authority Sought By the Sub-No. 34 Application

Magazines, books, and periodicals:

(A) Between Atlanta, Ga., and points in Alabama, Tennessee, and Georgia, as follows:

[list of specific routes omitted]

(B) Between Chattanooga, Tenn., and Nashville and Knoxville, Tenn., and Rome, Ga., as follows:

[list of specific routes omitted]

(C) Between Knoxville, Tenn., and Elizabethton and LaFollette, Tenn., as follows:

[list of specific routes omitted]

(D) Between Birmingham, Ala., and Florence, Ala., as follows:

[list of specific routes omitted]

(E) Between Montgomery, Ala., and Prattville, Ala.: [routes omitted] Service is proposed to and from all intermediate points on each of the above described routes.

Examiner's Report

APPENDIX B

Authority Presently Held in No. MC-65697 (Sub-No. 2)

Newspapers and newsprint stock consigned to or consigned from theatres or newspaper publishers, and *magazines, books, and periodicals* consigned to or from magazine dealers and distributors.

(A) Between Atlanta, Ga., and points in Alabama, Tennessee and Georgia, as follows:

[list of specific routes omitted]

(B) Between Chattanooga, Tenn., and Nashville and Knoxville, Tenn., and Rome, Ga., as follows:

[list of specific routes omitted]

(C) Between Knoxville, Tenn., and Elizabethton and LaFollette, Tenn., as follows:

[list of specific routes omitted]

(D) Between Birmingham, Ala., and Florence, Ala., as follows:

[list of specific routes omitted]

(E) Between Montgomery, Ala., and Prattville, Ala.: [routes omitted] Service is authorized to and from all intermediate points on the above-specified routes:

Recommended Order

Recommended by James A. McKiel,
Hearing Examiner.

(Signature) James A. McKiel

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1966.

No. MC-C-4892

DANCE FREIGHT LINES, INC.

v.

THEATRES SERVICE COMPANY

This proceeding being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the examiner, on the date hereof, having made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That defendant, Theatres Service Company be, and it is hereby, notified and required to cease and desist and thereafter to refrain and abstain from the performance of transportation, in interstate or foreign commerce, of the character found in said report to be unlawful and in violation of the provisions of the Interstate Commerce Act.

It is further ordered, That the statutory compliance date, after which defendant will be held to be in willful violation of this order, shall be the 30th day following service of the notice that this order has become effective as the order of the Commission, division 1.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

H. NEIL GARSON,
Secretary.

(SEAL)

Recommended Order

Recommended by James A. McKiel, Hearing Examiner.

(Signature) James A. McKiel

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of , A. D. 1966.

No. MC-65697 (Sub-No. 34)

THEATRES SERVICE COMPANY EXTENSION—
MAGAZINES, BOOKS, AND PERIODICALS

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

H. NEIL GARSON,
Secretary.

(SEAL)